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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	CONSOLIDATED DOCKET NO.
Cable Royalty Funds	)	14-CRB-0010-CD/SD
	)	(2010-2013)
In the Matter of	)	
	)	
Distribution of	)	
Cable Royalty Funds	)	

MULTIGROUP CLAIMANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF *WORLDWIDE SUBSIDY GROUP V. HAYDEN*

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In response to Multigroup Claimants' *Emergency Motion for Stay*, the MPAA and SDC submit a brief that is substantially similar to a brief filed by the SDC in U.S. District Court in opposition to IPG's motion for temporary restraining order in the matter *Worldwide Subsidy Group v. Hayden* (the "*Hayden* action"). In opposition to Multigroup Claimants' motion to stay, those parties walk through the various criteria by which a temporary restraining order should issue. No distinction is made regarding the different considerations pertinent to the three separate proceedings for which IPG or Multigroup Claimants sought a stay.[1]

A. THE MPAA/SDC ADDRESS IRRELEVANT CRITERIA INAPPLICABLE TO WHETHER A MOTION TO STAY SHOULD ISSUE IN THESE PROCEEDINGS.

As a rather apparent observation, the standards and criteria for imposition of a *temporary restraining order* have never been the criteria required for a stay of CRB proceedings. Prior stays issued by the CRB such as those cited by IPG in its motion, were based on more practical concerns regarding the efficiency of staying particular proceedings that might be influenced by outside legal actions. By their opposition brief, the MPAA/SDC attempt to draw the Judges into making determinations on which the Judges have no legal authority to rule, e.g., whether the U.S. District Court has jurisdiction to preside over the *Hayden* action, and whether IPG has a likelihood of success on the merits of such action. The fact that it is the CRB's determinations that are under review in the action, and that it is the CRB that is a defendant in the action, already

[1] Per an order issued today, December 22, 2017, the 2010-2013 cable/satellite royalty

reveals the Judges' position as to their own rulings. Courts issuing rulings do not sit in review of their own rulings.

B. THE DISTRICT COURT RETAINS JURISDICTION OVER THIS MATTER, AS DEMONSTRATED BY PRIOR ACTIONS BEFORE THIS COURT.

Notwithstanding, the MPAA/SDC arguments fail, such as their contention that the District Court lacks jurisdiction to sit in review of any aspect of this proceeding. Indeed, the MPAA/SDC characterizes the Judges' refusal to acknowledge ninety-nine (99) validly filed claims as mere interlocutory orders that are not allowed review until CRB distribution proceedings have concluded *without* the submission of any evidence relating to the value of such validly filed claims.

The MPAA/SDC propose that this proceeding move forward, with the various parties' acquisition of data, engagement of expert witnesses, exchange of discovery, motion and trial proceedings, and to have a decision rendered by the Judges, all for the purpose of addressing the allocation of collected royalties that will be nullified and rendered moot if *any* of forty-two IPG-represented claims are ultimately found to have been inappropriately refused acknowledgment and IPG's "presumption of validity" inappropriately disregarded. A more pointless exercise could not be imagined. According to the MPAA/SDC, IPG has an adequate remedy before the U.S. Court of Appeals for the District of Columbia under 17 U.S.C. § 803(d).[2]

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proceedings have been consolidated into a single proceeding.

[2] The MPAA/SDC contention is questionable. Appeal to the Court of Appeals under 17 U.S.C. § 803(d) is limited to "any aggrieved participant in the proceeding . . . who fully

The MPAA/SDC assert this position despite the fact that two separate actions seeking substantially similar remedies, for substantially similar acts, under a substantially similar statutory scheme, have successfully been filed against the Librarian of Congress and the U.S. Copyright Office without any challenge to or issue with the jurisdiction of the District Court. Specifically, in the matters of *Universal City Studios LLP v. Peters* (U.S.D.C. No. 03-1082 (RMC)), and *Metro Goldwyn-Mayer Studios, Inc. v. Peters* (U.S.D.C. No. 03-179 (RMC)), actions were brought by two corporate entities for the Librarian's refusal to acknowledge the timeliness of filed claims. Rulings on those actions were forthcoming by the District Court (see **Exhibits 1 and 2**), those matters were appealed to the Court of Appeals for the District of Columbia, and further rulings issued (see **Exhibit 3**, *Universal City Studios LLP v. Peters* 402 F.3d 1238 (D.C. Cir. 2005)). At no time was there an issue that the District Court was the appropriate court for review of the Librarian's refusal to acknowledge the filed claims.

The most significant basis by which the *Universal* and *Metro Goldwyn-Mayer Studios* cases may be distinguished is by the fact that they were brought prior to establishment of the CRB under the current incarnation of 17 U.S.C. §§ 801, *et seq.* Notwithstanding, the versions of those statutes pre- and post- creation of the CRB are identical for all purposes herein, as the pre-2005 version of those statutes affords the CRB's predecessor *the identical authority* "[t]o accept or reject royalty claims filed under

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participated in the proceeding . . ." The language of such provision suggests that any claimant whose claim was not recognized by the CRB at the outset, and was thereby

sections 111, 119 . . . on the basis of timeliness or the failure to establish the basis for a claim",[3] and affords identical appeal to the Court of Appeals for the District of Columbia following the issuance and publication of a "final determination" in the Federal Register.[4]

Conveniently, nowhere do the MPAA/SDC address what possible jurisdictional distinction there could be between the actions brought by *Universal* and *Metro Goldwyn-Mayer Studios* and the *Hayden* action. The *Hayden* action seeks, *inter alia*, review of the Judges' refusal to acknowledge forty-two IPG-represented claims, effectively on the grounds of "timeliness", as the Judges' ruling was that such claims were untimely because they were ostensibly never filed. Despite the identical statutory right of appeal to the Court of Appeals, jurisdiction of the dispute vested with the U.S. District Court, as it would in the *Hayden* action as well. Intricately linked with that determination is the Judges' denial of IPG's "presumption of validity" in the 1999-2009 satellite proceedings and, subsequently, such ruling as the predicate to deny Multigroup Claimants' "presumption of validity" in these proceedings.

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prohibited from "fully participating" in the proceeding, would have no recourse to the Court of Appeals.

[3] *Cf.* 17 U.S.C. § 801(c)(2) (enacted Dec. 17, 1993) *with* 17 U.S.C. § 801(b)(4) (enacted Nov. 30, 2004).

[4] *Cf.* 17 U.S.C. § 802(g) (enacted Dec. 17, 1993) *with* 17 U.S.C. § 803(d)(1) (enacted Nov. 30, 2004).

C. THE MPAA/SDC SUMMARILY DISPUTE THE SIGNIFICANCE OF IPG-PRESENTED FACTS SET FORTH IN THE *HAYDEN* PLEADINGS, RELYING EXCLUSIVELY ON THE "DEFERENTIAL" STANDARD ACCORDED TO CRB FINDINGS.

In its attempt to challenge that IPG has a likelihood of success on the merits, the MPAA/SDC make no attempt to address the actual facts set forth in the *Hayden* pleadings, relying entirely on the deferential standard accorded to CRB findings. As though it should elevate its argument, the MPAA/SDC summarily characterize the challenged CRB findings as a "blatant discovery violation" and "strong evidence of perjury and false claims". The *Hayden* pleadings, which set forth the evidence that was before the CRB, paints a very different picture.

Of course, there are limits to the deference accorded to the CRB, as displayed by the multiple instances in which *the SDC* has sought review of CRB rulings, and the multiple instances in which those rulings have been reversed. *Settling Devotional Claimants v. Copyright Royalty Board* (August 14, 2015) (U.S.D.C.; Case no. 13-1276); *Settling Devotional Claimants v. Copyright Royalty Board* (February 10, 2017) (U.S.D.C.; Case no. 15-1084). Clearly, a standard of deference is not a cloak of invulnerability, and while suggested by the MPAA/SDC here, such is contrary to the position frequently advocated by the SDC to the Court of Appeals.

Nevertheless, a portion of the facts set forth in the *Hayden* pleadings (which facts the MPAA/SDC disregard) demonstrate that in the disregard of forty-two IPG-represented satellite claims, and the Judges resulting denial of IPG's "presumption of validity" worth tens of millions of dollars, the Judges repeatedly disregarded that the

predicate of its ruling was inaccurate. Specifically, the Judges issued their ruling without making a single query of IPG's witness, and asserted the existence of the CRB's "ordinary course of official business" without a sponsoring witness for cross-examination. The Judges maintained their position even after IPG presented evidence directly contradicting the Judges' asserted "ordinary course of official business", and erred by dismissing as "irrelevant" such evidence on the evidently incorrect ground that such evidence only pertained to the actions of the CRB's predecessor.

All of the foregoing acts stood as the basis for the Judges' denial of IPG's "presumption of validity" in the 1999-2009 satellite/2004-2009 cable proceedings, and remain the predicate by which the Judges denied Multigroup Claimants a "presumption of validity" in these proceedings. Notably, the MPAA/SDC *do not even challenge the veracity of these facts*, either in their opposition brief or the SDC's opposition to IPG's motion for temporary restraining order. Specifically, no response addressing the foregoing facts is forthcoming by the MPAA/SDC, just a summary statement that the *Hayden* action does not reflect a substantial likelihood of success on the merits.

D. IPG AND ITS REPRESENTED CLAIMANTS WILL SUFFER IMMEDIATE IRREPARABLE INJURY AND PREJUDICE; AN EXIGENCY EXISTS.

In seeming disregard of the facts, the MPAA/SDC blithely contend that "any injury is reparable". Of course, the premise of the MPAA/SDC argument is that the very issues raised in the *Hayden* action will not be reviewed by the District Court under any

circumstances, but only by the Court of Appeals. Based on this incorrect presumption, the MPAA/SDC aver that IPG will eventually, *someday,* get its day in court.

If IPG's forty-two (42) claimant claims are not allowed to be considered as part of the ongoing 1999-2009 satellite/2004-2009 cable CRB proceedings, and the Judges' ruling regarding the "presumption of validity" continues to stand, then the predicate for the Judges' denial of Multigroup Claimants' "presumption of validity" in this proceeding will continue to stand. This proceeding will move forward, a determination will issue by the Judges and royalties will be awarded in this action without the ability of Multigroup Claimants to submit a shred of evidence regarding the value of claims dismissed because they were denied a "presumption of validity".

Ironically, the MPAA/SDC make the same oft-repeated argument, that a stay of proceedings will only serve to delay a final determination, and delay distribution of royalties to entitled claimants. As the Judges are aware, these proceedings relate to royalties collected by the Copyright Office as far back as 1999, i.e., *seventeen years ago*. Despite being organized pursuant to 2004 legislation, the CRB did not initiate proceedings relating to the distribution of such royalties until September 2013, *nine years later*. After all parties fully participated in those proceedings, and after a five-day hearing in April 2015, the CRB issued its determination thereon until May 2016, *thirteen months later*, remanding the proceedings back to itself for a do-over. See *Order Reopening Record and Scheduling Further Proceedings* (May 4, 2016). Similarly, this proceeding relates to 2010-2013 royalties, and while less aged, the same problem is

posed by moving forward pending resolution of outside litigation that could dramatically affect the claims that should be considered by the Judges. Further, both the MPAA and SDC have been advanced substantial percentages of their claims by the Judges. To suggest that there remains an urgency to get funds to the rightful claimants after the foregoing delays contradicts all prior actions of the CRB.

Along similar lines, the MPAA/SDC make much of the timing of IPG's complaint, noting that the complained-of acts, i.e., the rulings of the Judges, were initially issued on March 15, 2015. Good reason exists for IPG's cautionary delay in the filing of the *Hayden* action. In the 2010-2013 cable and 2010-2013 satellite proceedings, arguments were being made against IPG-represented interests that were similar to and inextricably tied to arguments made in the 1999-2009 satellite/2004 cable proceedings, all as part of the claims challenge process. Per the required schedule imposed by the Judges, briefing on such claims challenge process concluded on November 15, 2016, and the Judges were to have an evidentiary hearing on that briefing on January 10, 2017. Notwithstanding, the Judges issued an order on December 13, 2016, asserting that an evidentiary hearing would not occur unless deemed necessary, then took the matters under submission.

Not until October 23, 2017, i.e., eleven months after submission of the last required briefing, did the Judges issue a much-anticipated ruling in CRB Docket Nos. 14-0010 CD 2010-2013 and 14-0011 SD 2010-2013, which rulings are inextricably related to the Judges' ruling of March 15, 2015 in this proceeding. Quite simply, had the Judges

addressed the claims challenge process sooner than eleven months, IPG would have proceeded with the *Hayden* action earlier.

In sum, no doubt for good reasons beyond the Judge's control, the adjudication of this matter has never been processed in a fashion consistent with the concept that "time is of the essence", rendering any such claim highly dubious and at odds with the facts and exigencies facing this adjudication.

By this motion, Multigroup Claimants is specifically trying to *avoid* piecemeal litigation. The process advocated by Multigroup Claimants *guarantees* there will be no piecemeal litigation. The process advocated by the MPAA/SDC, by contrast, seeks to have the parties move forward with proceedings that will definitively be mooted if IPG prevails with *any* of its arguments in the *Hayden* action. No more obvious display of a "lack of public interest" could exist than with the alternative advocated by the MPAA/SDC.

Beyond the foregoing, review of the MPAA/SDC opposition brief reflects speculation as to an ulterior motive for IPG's motion for temporary restraining order. According to the MPAA/SDC, IPG seeks the gratuitous delay of all proceedings and cites to an email from IPG counsel. See Exhibit A to MPAA/SDC opposition. Conveniently, the MPAA/SDC omit the very phrase in that email that *expressly* sets forth IPG's rationale for stipulating to a delay in the filing of a rebuttal brief in this proceeding:

> "*In order to avoid any accusation that WSG sought to have the adverse parties 'show their hand'*, we are informing you that WSG will not challenge any delayed filing of a written rebuttal statement by either the MPAA or SDC pending a determination by the U.S. District Court as to

> whether a TRO will issue, or a ruling by the CRB on WSG's motion for a stay." (emphasis added).

Obviously, if IPG had sat silent, the MPAA/SDC would now be accusing IPG of seeking to have such parties "show their hand" in these proceedings even though the District Court might have immediately issued an injunction pending resolution of the *Hayden* action. No reason is stated as to *why* IPG would seek to gratuitously delay all proceedings. In fact, Multigroup Claimants' motive for seeking a stay is apparent – to assure that IPG will be allowed to present evidence as to the value of the claims that were inappropriately disregarded or dismissed by the Judges, and to avoid the possibility that the parties will have to engage in multiple proceedings before the CRB if IPG demonstrates that *any* of the ninety-nine claims should have been considered by the Judges. No ulterior motive exists. Multigroup Claimants transparently seeks the efficient resolution of proceedings in order that the parties not have to repeatedly return before the CRB once the Judges' rulings are remedied following review.

In previous circumstances, the CRB has similarly stayed proceedings pending the outcome of litigation concerning the positions of the parties and claims at issue in pending distribution proceedings. See, e.g., **Exhibit 4**, Docket 2008-1 CRB CD 98-99 (*Sixth Order Continuing Stay of Proceedings*). Then, as now, there appeared to be little purpose in adjudicating claims before the CRB which could be significantly altered by outside litigation.

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CONCLUSION

For the foregoing reasons, Multigroup Claimants moves that the Judges order these proceedings stayed until further notice.

Respectfully submitted,

Dated: December 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd of December, 2017, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

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Certificate of Service

I hereby certify that on Friday, December 22, 2017 I provided a true and correct copy of the MULTIGROUP CLAIMANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF WORLDWIDE SUBSIDY GROUP V. HAYDEN to the following:

Devotional Claimants, represented by Clifford M Harrington served via Electronic Service at clifford.harrington@pillsburylaw.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

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Signed: /s/ Brian D Boydston